APPEAL NO. 010677

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 7, 2001. The hearing officer resolved the disputed issues by determining that the respondent's (claimant) average weekly wage (AWW) is $267.98. The appellant (carrier) appeals and urges reversal based upon what it advocates to be the hearing officer's improper calculation of the claimant's AWW. There is no response on file from the claimant.

DECISION

Affirmed.

The hearing officer did not err in concluding that the claimant's AWW is $267.98. The claimant here works for (employer) as both a domestic employee (job A) and an employee who works for a few hours a week at the employer's office (job B), performing essentially similar duties, i.e., cleaning services. The carrier does not challenge that the incident in this case involved a compensable injury to the claimant's back that occurred at job B _____.

The carrier first argues that the claimant's injury at job B limits the calculation of her AWW to those hours worked at job B and does not dispute compensation therefor. The crux of the carrier's argument in this regard is that the claimant's employment at job A, domestic duties, makes her wages therefrom exempt from the 1989 Act and thus not to be included in the calculation of her AWW, pursuant to Section 406.091(a) of the 1989 Act. Section 406.091 is not applicable to the calculation of AWW. It deals with whether a worker is covered by the 1989 Act.

Section 406.091(a)(1) of the 1989 Act reads, in pertinent part, "[t]he following employees are not subject to this subtitle: a person employed as a domestic worker . . . ." Section 406.091(b) provides as follows in relevant part:

> [a]n employer may elect to obtain workers' compensation insurance coverage for an employee or classification of employees exempted from coverage under Subsection (a)(1) or (a)(3). Obtaining that coverage constitutes acceptance by the employer of the rights and responsibilities imposed under this subtitle . . . ."

There is no question of coverage in the present case and therefore Section 406.091 is inapplicable here. We reject the carrier's argument that Section 406.091 would exclude the claimant's wages from job A from the calculation of her AWW, since nowhere in its terms does the section reference AWW. We also note that even were coverage in issue here, Section 406.091(b) would provide for coverage as the employer has purchased a policy of workers' compensation insurance.

Alternatively, the carrier argues that the claimant's "dual-capacity" employment by the employer does not entitle her to receive compensation based upon the sum total of her earnings. Again, this argument fails as a matter of law. The carrier cites Harris v. Casualty Reciprocal Exchange, 632 S.W.2d 714 (Tex. 1982) and Texas Workers' Compensation Commission Appeal No. 94401, decided May 19, 1994, in support of its position that while the claimant may indeed be covered, the Texas Workers' Compensation Commission has been silent as to the method of calculating the AWW of an employee in that situation; therefore, the carrier urges, only the wages from the "covered" activity, job B, should be included in the AWW.

While it is true that neither Harris nor Appeal No. 94401 address how to calculate an employee's AWW in a "dual-capacity" employment situation, the carrier's reliance on these authorities is misplaced. There is no question that the claimant had but one employer, who obtained coverage for his office employees, including the claimant. The claimant received one paycheck from one source and filled out only one W-2 IRS tax form. Thus, her "wages" would be all monies paid to her by her sole employer.

Consequently, to determine the claimant's AWW, the hearing officer did not err in reverting to the general calculation method described in Section 408.041(a) of the 1989 Act which states, in pertinent part, that "the [AWW] of an employee who has worked for the employer for at least 13 consecutive weeks immediately preceding an injury is computed by dividing the sum of the wages paid in the 13 consecutive weeks immediately preceding the date of the injury by 13." The hearing officer made findings consistent with his reliance upon this method; accordingly, the hearing officer did not err in finding that the claimant's AWW is $267.98. Other authority supporting the hearing officer's inclusion of the claimant's wages from job A includes Insurance Company of the State of Pennsylvania v. Stelhik, 995 S.W.2d 939 (Tex. App.-Fort Worth 1999, pet. denied). The court in Stelhik wrote that when using Section 408.041 of the 1989 Act to determine the AWW of an employee who had concurrent employment with what very nearly amounted to one employer,[1] all wages earned from the employer(s) should be included because Section 408.041 does not "expressly exclude consideration of concurrent employment."

The 1989 Act must be given liberal construction in order to carry out its evident purpose, which is to assist injured workers. Albertson's, Inc. v. Sinclair, 984 S.W.2d 958 (Tex. 1999). Further, in interpreting a statute, we must "diligently attempt to ascertain legislative intent and shall consider at all times the old law, the evil, and the remedy." TEX. GOV'T CODE ANN. § 312.005 (Vernon 1998).

[1]In the Stelhik case, the claimant was a service clerk for American Airlines who sometimes acted as a union representative for similarly situated employees. Both American Airlines and the union paid her wages, depending upon her duties for each at a particular time. The claimant there was injured while at work as a service clerk, but sought back wages including those from her service as a union representative in the previous 13 weeks.

For these reasons, we affirm the hearing officer's decision and order.

Gary L. Kilgore
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

CONCURRING OPINION:

I concur in the affirmance of the hearing officer's decision in light of the facts that the claimant had only one employer, was paid for all work performed for that employer by one paycheck, and sustained a compensable injury that was covered under the employer's workers' compensation policy. I wish to point out that in Insurance Company of the State of Pennsylvania v. Stelhik, 995 S.W.2d 939 (Tex. App.-Fort Worth 1999, pet. denied), the court's decision was that the employee's union replacement wages should be considered in calculating the employee's average weekly wage based on the unique facts of the case, and that the court pointed out that it was not a situation of an employee working two part-time jobs for two unrelated employers.

Robert W. Potts
Appeals Judge